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In the Supreme Court of the United States

OCTOBER TERM, 1906.

No. 601.

SOUTHERN RAILWAY COMPANY, ET AL.,
Appellants,

vs.

H. H. TIFT, ET AL.,
Appellees.

REPLY BRIEF IN BEHALF OF APPELLEES.

ELLIS, WIMBISH & ELLIS,
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REPLY BRIEF IN BEHALF OF APPELLEES.

I.

THE REASONABLENESS OF A PARTICULAR RATE IS A PURE QUESTION OF FACT TO BE DETERMINED IN THE LIGHT OF ALL OF THE FACTS AND CIRCUMSTANCES OF THE CASE.

There is no LEGAL standard of the reasonableness of a rate. Should all of the material facts be admitted, the Court could not say, AS A MATTER OF LAW, that a rate is either reasonable or unreasonable, in the absence of a con-

tention that the rate is confiscatory. In this it is unlike questions of fraud or negligence where, on a given state of facts, a legal presumption arises.

The reasonableness of a rate is determined as a MATTER OF FACT in the light of all the facts and circumstances of the particular case. Various elements are to be considered, such as the bulk, weight and value of the commodity; the length of the haul, for the longer the haul the lower the rate per ton mile; the volume of the movement, for the greater the tonnage the lower the rate; the expense of handling; the risk involved; the situation of the parties; and the existence or absence of competition. There are also certain presumptions or inferences of fact, as well as certain accepted principles which obtain in rate-making, that furnish standards for testing the reasonableness of a rate.

Perhaps the leading presumption applicable to this case is that where a rate has long been in force and traffic has moved freely and steadily under it, the rate is presumed to be reasonable and the carrier must justify the advance; particularly is this true where the carrier and the shipper have prospered under the rate. The appellants recognized the force of this presumption and unsuccessfully attempted to justify the advance. An examination of the report of the Commission will show that these various criteria, and the presumptions of fact arising thereon, were duly considered in this case.

The Commission found, among other things:

(1) That the advance was not the product of free com-

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petition, but was the result of a combination or agreement between the carriers. (Trans. Pt. 111, page 1212);

(2) That weight, bulk and value considered, the rate upon lumber was relatively higher than that of other commodities; and that upon no other commodity of as great utility did the rate to destination exceed the value of the commodity at the point of production, as was the case with respect to much of the lumber shipped to the Central West. (Trans. Pt. II, pages 1029, 1030, 1053).

(3) That the tonnage of lumber was greater than that of any other commodity transported by the appellants excepting bituminous coal, and that the tonnage is constantly increasing. (Trans. Pt. II, page 1031).

(4) That the risk of loss in transit was so small as to be almost negligible. (Trans. Pt. II, page 1043).

(5) That the service is inexpensive and the cost of handling is relatively small. (Trans. Pt. II, pages 1040, 1041).

(6) That the previous rate was remunerative to the carriers (Trans. Pt. II, pages 1048, 1054, 1055); and that under it the carriers had prospered. (Trans. Pt. II, pages 1039, 1040).

The Commission also gave due consideration to the length of the haul, to the situation of the parties, and to the rights and interests of the public.

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II.

THE PRESUMPTIONS CONTENDED FOR BY APPELLANTS ARE EITHER INCORRECT OR INAPPLICABLE, OR WERE DULY CONSIDERED BY THE COMMISSION AND THE COURTS BELOW.

The learned counsel for appellants sets out on pages 6 to 10 of his supplemental brief certain propositions which he asks the Court to declare as a part of the "law of transportation."

His propositions are:

(1) When a rate has been lawfully established, it is presumed to be reasonably low.

> REPLY: It is true that the presumption of reasonableness favors an existing rate which has been so long in force as to demonstrate that traffic will move freely under it; but the contrary presumption applies to an ADVANCE in a long existing rate which had proven remunerative to the carrier.

(2) Where a rate is the product of competition among carriers, it is presumed to be reasonably low.

> REPLY: If an existing rate is the result of CARRIER COMPETITION, it is presumed to be rea-

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sonably low; market competiton, however, may produce a rate unreasonably high or unreasonably low. (See original brief, pages 73 to 75). Competition may lower rates, but never advances them. (U. S. vs. Freight Association, 166 U. S. 341).

(3) Where the rate is as low or lower than those obtaining elsewhere for similar distances, it is presumed to be reasonable.

REPLY This is not true unless it be shown that CIRCUMSTANCES AND CONDITIONS prevailing in the territory resorted to for comparison are SUBSTANTIALLY SIMILAR. The comparisons in this case are inapt and of little or no evidentiary value. (See original brief, pages 89 to 93).

(4) Where the carrier has for a long series of years maintained rates on a commodity, and the interest affected has prospered, the rate is presumed to be reasonably low.

REPLY: We concur in the proposition that such rates are reasonable. It was considered and applied by the Commission in this case. (Trans. Pt. II, pages 1047, 1048).

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(5) Rates may be adjusted with reference to the price of the commodity and the conditions of the market.

REPLY: We deny this proposition. It is but another statement of the unsound doctrine that a rate may be made as high as the traffic will bear. It is not true in this case that rates have followed the fluctuation of prices in the market, nor is it true with respect to cotton, naval stores and other commodities. It is manifest that a rate so adjusted would be unstable, and would ignore the right of the public to demand that no more be exacted of it than the reasonable value of the service rendered. (Smyth v. Ames, 169 U. S. 466).

(6) Where a rate has been lowered to meet a market depression, it may be restored when such depression ceases.

REPLY: Whether or not true in the abstract, this proposition has no application to the case at bar. The carriers claim to have lowered the rates on lumber in 1891 and 1894, not because of business depression, but in order to meet the competition of other lumber in the Western markets. We have shown in our original brief (pages 104 to 108) that the last advance was not a restoration of a former rate, but THAT THE AVERAGE RATE from Georgia points to Ohio River crossings is 1.25 cents per hundred pounds higher than in 1891, and 2.75 cents higher

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than in 1894. It is true that the Cairo rate is 1 cent less than in 1891, but it is 3 cents higher than it was in 1894. THE CINCINNATI RATE HAS NEVER BEEN REDUCED AND IS NOW 3 CENTS HIGHER THAN IT WAS IN 1891. (Trans. Pt. II, page 1026). Cincinnati is the nearer and natural gateway for Georgia lumber, and by far the greater part of Georgia pine to Western destinations actually moves through Cincinnati; and yet that rate has never been lowered in order to meet market depression or competition, but has always and steadily advanced.

(7) Where operating expenses have increased because of greater traffic, rates may be advanced generally and impartially to compensate for the loss in net revenue.

REPLY: We do not feel called upon to admit nor deny this proposition. It has no application to the case at bar. There has been no general and impartial advance in rates, but lumber and pig-iron were singled out because it was thought they could "bear the advance." It was made not because the former rate was unremunerative, but because the carriers desired to share in the supposed prosperity of the lumber men. (See original brief, pages 69 and 70; Trans, Pt. II, pages 910 to 912, 1051).

(8) The carrier may compensate for increased operating

expenses by advancing rates impartially, provided that the percentage of increase in operating expenses has been greater than the advance in rates.

REPLY: We have last above replied to a part of this proposition. The fact is that the prices on lumber so far from advancing, have actually declined. (Trans. Pt. II, pages 1031, 1032). This proposition is further unsound because it does not take into consideration what may be fair compensation for the cost and value of the service.

(9) It is legal and proper for a carrier to charge improvements and betterments to operating expenses.

REPLY: This may be true as a matter of bookkeeping and in the interest of the corporation. It is not true, however, as a basis for rate-making, for that all of the net earnings may be diverted to permanent improvements and rates advanced accordingly, without any regard to the rights of the public and the fair compensation for the service Original Brief, p. 109. (3); Trans. Pt. II, page 1037).

(10) The fact that, in order to meet the demands of the public for increased facilities, the carrier has been required to expend large sums in betterments and permanent improve-

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ments should be taken into consideration in determining the reasonableness of an advance in rates.

REPLY: This may be true with reference to a general increase in rates subject to the limitation that the right of the public to insist upon just and reasonable rates be respected. It is not true with reference to an advance in a particular rate which is admitted to be profitable. The carrier may not ask more than fair compensation for the service rendered. What constitutes "fair compensation" is a question of pure fact, if the rate yields some profit and is therefore not confiscatory. The Commission has found that the former rate was remunerative (Trans. Pt. II, page 1048); it is admitted by the appellants to have afforded "some profit" (Trans. Pt. I, page 212); and, in the absence of proof to the contrary, it is to be regarded as fairly compensatory. (Original brief, pp. 74, 75).

(11) A rate may be profitable if it exceeds the cost of the service, and yet be unreasonably low if it does not contribute its fair share of operating and other expenses.

REPLY: If the rate upon lumber, which was admitted to be profitable, did not contribute its fair share of expenses, the burden was upon the appellants to show this fact by the proof. This they utterly failed to do. The record may be searched in vain for

any fact to support this contention, other than the fact that the average rate per ton mile on the long haul of lumber is less than the average rate on all classes of traffic, and less than the average rate of operating expenses. Such facts are insufficient to support the conclusion. (Minneapolis & St. Louis R. Co. v. Minnesota, 186 U. S. 257; Original Brief, pp. 77 to 79).

III.

THE RATES ON LUMBER FROM GEORGIA SHIPPING POINTS TO OHIO RIVER DESTINATIONS ARE MATERIALLY HIGHER THAN FROM MISSISSIPPI.

The learned counsel for appellants is in error when he states that the rates from Georgia are no greater than from Mississippi points to the Ohio River.

The flat or blanket rate from all points in Louisiana, Mississippi, and a part of Alabama, to Cairo, is 16 cents. (Trans. Pt. II, page 1023).

Georgia shipping points are divided into groups or rate

bases. The rate from Southern Railway, group 1, is 16 cents. From this group little or no lumber moves. The rate from the other groups in Georgia, which originate the lumber, is from 1 to 7 cents higher. These rates to Cairo are as follows:

Southern Railway:

Group 3 .....17 cents.
Group 4 .....18 cents.
Group 5 .....19 cents.

Georgia Southern & Florida Railway:

Group 1 .....17 cents.
Group 2 .....18 cents.
Group 3 .....19 cents.
Group 4 .....20 cents.

Atlantic Coast Line:

Group 1 .....20 cents.
Groups 2 and 3 .....21 cents.
Group 4 .....22 cents.
Group 5 .....23 cents.

The average rate from the Georgia groups to Cairo is 19 1/6 cents, as against 16 cents from Mississippi. (Trans. Pt. II, pages 1022-1024-1027).

The average distance from Georgia points to Cincinnati is 665 miles; the average rate is 23.97 cents, as against the flat rate of 16 cents for Mississippi points to Cairo, their nearest gateway, an average distance of 412 miles. (Trans. Pt. II, pages 1022-1027).

IV.

THE CONTENTION THAT COMPLAINT SHOULD HAVE BEEN FIRST MADE TO THE COMMISSION CONCERNS THE ORDER OF PROCEDURE, RATHER THAN THE JURISDICTION OF THE COURT.

1. The learned counsel for the appellants challenges the jurisdiction of the Circuit Court as a court of equity upon the ground that the bill was filed before the advance became effective, and before the reasonableness of the advanced rate had been or could be determined by the Interstate Commerce Commission. This is very nearly akin to a demurrer upon the ground that an adequate legal remedy existed. This contention is unsound.

The bill was filed to enjoin a threatened advance in rates, before they could be legally established. If, as alleged in the bill and shown by the evidence, irreparable injury would ensue, the appellees had a cause of action. The Commission was without jurisdiction to determine the reasonableness of a threatened advance. There was no legal remedy. "Equity will not suffer a wrong to be without a remedy."

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It can scarcely be doubted that a court of equity has general jurisdiction to determine the reasonableness of a rate and to enjoin a threatened advance that would work irreparable injury. This Court has several times declared that the reasonableness of rates is a judicial question.

Chicago, etc., Ry. Co. v. Minnesota, 134 U. S. 418; 458 cited in

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 398;

Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 244.

Smyth v. Ames, 169 U. S. 466, 523.

Covington, etc., Turnpike Co. v. Sandford, 164 U. S. 578, 592, 593.

After a rate has been found unreasonable and unjust by the Commission, a Federal Court of Equity must be resorted to and its process invoked. In such a proceeding, the Court hears additional evidence and arrives at its own independent conclusion. The finding of the Commission is only prima facie evidence of the facts found, in no way limiting the right and power of the Court to proceed judicially to determine the question.

It seems clear that if equitable relief against an unjust advance may be sought at any time prior to the actual determination of the reasonableness of the rate by the Commission, the relief may be invoked when the injury is about to be inflicted. The filing of a complaint before the Commission cannot add to the jurisdiction of the Court. It is to be presumed that in matters of such importance, affecting the carriers and the public, the Court will act cautiously and

grant the relief only in a clear case of such injustice as would cause irreparable injury; but this is no argument against the JURISDICTION of the Court.

In the case at bar it has been nearly four years since the advance in rates became effective. Neither fault nor unnecessary delay can be attributed to the litigants, the Commission, or the Court. The advance, coming at a time of lessened demand for Georgia pine in the markets affected, caused a prostration of the business of the Georgia lumbermen in those markets. (Trans. Pt. II, pp. 1028, 1029). The mere return of the excess in freights paid will not compensate for the injury to the business of the lumber manufacturers.

2. Neither in their demurrer nor in their answer to the original bill, did the appellants set out specifically that the proceedings were defective because previous complaint had not been made to the Commission. The demurrer was not argued separately, but on the first hearing, May 12th-16th, 1903, "WITH THE CO-OPERATION OF THE DEFENDANTS AND AT THEIR EXPRESS INSTANCE," the case was heard "on the demurrers, answers and affidavits, with large expense to the parties and much labor to all concerned." The case was fully before the Court. (Trans. Pt. I, p. 202, Opinion of Speer, J.)

The suggestion that complaint be made to the Interstate Commerce Commission came first from the Court, who considered it the "BETTER PRACTICE," and in order that

this might be done the Court dissolved the temporary restraining order, permitted the advanced rates to be put into effect, and suspended further proceedings. (Trans. Pt. I, p. 204).

V.

IF ANY DEFECT EXISTED IN THE ORIGINAL PROCEDURE, IT HAS BEEN CURED BY THE FINDING OF THE COMMISSION AND THE ACTION HAD THEREON.

1. After the Commission had handed down its opinion and report, to-wit, on March 17th, 1905, the appellees filed in the Circuit Court their PETITION, against the appellants, reciting the proceedings before the Commission, and filing a certified copy of the opinion and report and of the order of the Commission. The prayers were for injunction pendente lite, for permanent injunction, and for general relief. (Trans. Pt. I, pp. 278-280). The appellants appeared and answered to the merits, their contention being that the findings of the Commission were contrary to the weight of the evidence, the conclusions of law were erroneous, and the order was illegal and void and should not be enforced by the Court. (Trans. Pt. III, pp. 1066-1070). The evidence taken before the Commission was stipulated into the case.

(Trans. Pt. III, p. 1059). It was agreed that the hearing under the petition should stand for and be the hearing for final decree in equity. (Trans. Pt. III, p. 1208). At the hearing additional evidence was adduced by the parties and considered by the Court. (Trans. Pt. III, p. 1208). Upon consideration of the whole case, the Court rendered his opinion and entered final decree. That part of the decree directing the issuance of an injunction is substantially the same as if the cause had originated with the petition of March 17th (Trans. Pt. III, pp. 1227-1229). In all subsequent proceedings the cause was so treated by the parties and the Court. In their petition for supersedeas, the appellants offered to give bond "PAYABLE TO THE UNITED STATES OF AMERICA or such other payee as the Court might direct," conditioned for the payment "TO SUCH PERSON OR PERSONS AS MAY BE LEGALLY ENTITLED THERETO," any overcharges collected; the purpose being to protect the interests of all shippers and consignees, and not the appellees only. (Trans. Pt. III, p. 1241). The Court granted the petition upon terms for the protection of the public interest. (Trans. Pt. III, p. 1243). The special supersedeas bond was made payable to the United States of America "for the benefit of whom it may concern." (Trans. Pt. III, p. 1252). The learned counsel for the appellants in his brief in the Circuit Court of Appeals (p. 3) states that "the decree of the Circuit Court was in effect an approval of the order issued by the Inter-state Commerce Commission."

In view of these facts and proceedings, the learned counsel can hardly be now heard to say that he stands upon his

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demurrer to the original bill as being effectual against these proceedings.

VI.

This case is clearly distinguished from the Abilene case as follows:

1. The bill was filed BEFORE the advanced rates were established.

2. An injunction against putting an advance into effect necessarily operates IN FAVOR OF THE PUBLIC, and not of the complainants only.

3. There is no claim for pecuniary restitution except in the supplemental bill BASED UPON A STIPULATION IN JUDICIO.

4. Under the stipulation, the petition for supersedeas,

the order of the Court thereon, and the special supersedeas bond, the interests of the public and the rights of all shippers and consignees paying the overcharge are protected.

5. There can be no divergence between Courts in different jurisdictions, because the Court had full jurisdiction over the parties and the subject matter, and its decree would necessarily adjudicate all of the issues involved in the reasonableness of the advance.

6. There could be no divergence between the Court and the Interstate Commerce Commission, for that if the advance had been enjoined, the question would never have come within the jurisdiction of the Commission; had it been denied, complaint could have been made to the Commission, and its findings would have been prima facie evidence in the Court, as was the fact in the Tift case. Had complaint not been made to the Commission, it was within the jurisdiction of the Court to judicially determine the question, and such an adjudication would have been binding upon the carriers, the shippers and the public.

7. In the Tift case the unreasonableness of the advanced rates was in fact found by the Commission in the first

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instance; and subsequent proceedings were in effect a judicial review and enforcement of that finding.

Respectfully submitted,

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